IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. RADFORD DARRELL SMITH, Petitioner.	)	2 CA-CR 2007-0033-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-67646

Honorable Kenneth Lee, Judge

REVIEW GRANTED; RELIEF DENIED

Radford D. Smith

Ely, Nevada
In Propria Persona

B R A M M E R, Judge.

¶1 Radford Smith was convicted after a jury trial of two counts of theft by conversion and/or misrepresentation, one a class six felony based on the property's value of $250 to $1,000 and the other a class four felony based on a value of $2,000 to $3,000. Smith admitted he had two historical prior felony convictions, and the trial court sentenced him to concurrent, presumptive prison terms of 3.75 years and ten years. This court affirmed

Smith's convictions and sentences on appeal. *State v. Smith*, No. 2 CA-CR 2004-0141 (memorandum decision filed July 22, 2005). Smith now seeks relief from the trial court's denial of his request for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P., 17 A.R.S. We review the court's ruling for an abuse of discretion, *see State v. Decenzo*, 199 Ariz. 355, ¶ 2, 18 P.3d 149, 150 (App. 2001), and find none.

¶2 Smith raised four issues in his post-conviction petition. We do not address his arguments on two of them—that the state presented perjured testimony at trial and that his sentences are illegal. Those issues are precluded because they could have been raised on appeal but were not. *See* Ariz. R. Crim. P. 32.2(1), (3).

¶3 We agree with the trial court that Smith failed to show his alleged newly discovered evidence meets the required elements for such a claim under Rule 32.1(e). Those requirements are:

> (1) the evidence must appear on its face to have existed at the time of trial but be discovered after trial; (2) the [petition] must allege facts from which the court could conclude the defendant was diligent in discovering the facts and bringing them to the court's attention; (3) the evidence must not simply be cumulative or impeaching; (4) the evidence must be relevant to the case; (5) the evidence must be such that it would likely have altered the verdict, finding, or sentence if known at the time of trial.

State v. Bilke, 162 Ariz. 51, 52-53, 781 P.2d 28, 29-30 (1989).

¶4 Smith contends the perjury of one of his victims at trial was newly discovered evidence. Helen Barton testified she had given Smith a check for $1,700 for him to install

a new air conditioning and heating unit at her residence and another check for $265 for additional parts he needed but had received nothing in exchange. Smith contends she lied, saying he did install a new unit and an investigation by the county attorney's office after trial confirmed that he had.

¶5 But Smith certainly knew at the time Barton testified whether he had installed a new unit; he nevertheless chose not to testify in his own defense to avoid having the jury learn about his prior felony convictions. In addition, when his attorney cross-examined Barton, she challenged Barton's testimony that no unit had been installed. Counsel also impeached Barton with her statements in her initial report to the police and in an interview with a detective two weeks later that her only loss was from the $265 check and Smith had indeed installed a new unit. And Smith did not attach to his post-conviction petition the receipts he alleged confirmed he had purchased and installed the unit at Barton's house. Accordingly, Smith failed to show the evidence existed at the time of trial but was not discovered until after trial or that it was more than cumulative or impeaching. *See Bilke*, 162 Ariz. at 52-53, 781 P.2d at 29-30.

¶6 But, more importantly, Smith failed to show the evidence likely would have altered the verdict. *See id.* at 53, 781 P.2d at 30. The only count the state charged him with involving Barton was for theft of property worth $250 or more but less than $1,000. In finding him guilty of that count, the jury found the value of the property was between $250 and $1,000. The only other option the jury was given was a value of less than $250.

Therefore, Barton's testimony that Smith had performed no work in exchange for the $1,700 check she had given him, whether perjured or not, could not have affected the outcome of the case. And it certainly did not affect the jury's verdict as to Smith's other victim, who testified without contradiction that Smith had performed no work for the $2,506.88 she had paid him. The trial court therefore did not abuse its discretion in denying relief on Smith's claim of newly discovered evidence. *See Decenzo*, 199 Ariz. 355, ¶ 2, 18 P.3d at 150.

¶7 Smith also asserted his trial counsel was ineffective in failing to file a motion to vacate the judgment pursuant to Rule 24.2, Ariz. R. Crim. P., 17 A.R.S., as she had stated she would based on the allegedly newly discovered evidence about Barton. To state a colorable claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below prevailing professional standards and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985). If a defendant fails to establish one requirement, a court need not address the other. *State v. Ketchum*, 191 Ariz. 415, 416, 956 P.2d 1237, 1238 (App. 1997).

¶8 Contrary to Smith's assertion, his trial counsel did pursue the issue of Barton's allegedly perjured testimony. The issue was raised at the hearing at which Smith admitted his prior felony convictions, and the trial court continued the sentencing hearing at defense counsel's request while the county attorney's office investigated the claim. During the discussion on the request for a continuance, defense counsel simply noted the prosecutor

had agreed to extend the time to file any motion pursuant to Rule 24, "depending on what the investigation turns up." She did not, as Smith contends, promise the trial court that she would file such a motion. That counsel did not file a motion does not by itself suggest counsel was ineffective, particularly in view of Smith's failure to support with any evidence his allegations that Barton had committed perjury. Absent evidence that such a motion could have been successful, Smith failed to state a colorable claim that trial counsel was ineffective or that Smith was thereby prejudiced. That is especially true in light of the unchallenged conviction related to Smith's other victim, for which he received the lengthier sentence.

¶9 Although we grant review, we deny relief.

_____
J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

_____
PETER J. ECKERSTROM, Presiding Judge

_____
PHILIP G. ESPINOSA, Judge